

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
OIL PLUS, INC.	:	SMALL CLAIMS DETERMINATION DTA NO. 820564
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period March 1, 2000 through November 30, 2001.	:	

Petitioner, Oil Plus, Inc., 1635 Hylan Boulevard, Staten Island, New York 10305, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 2000 through November 30, 2001.

A small claims hearing was held before Thomas C. Sacca, Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on March 14, 2006 at 2:45 P.M., which date commences the three-month period for the issuance of this determination. Petitioner appeared by Edward G. Bailey, Esq. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Sheldon Trachtenburg).

ISSUE

Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of a conciliation order.

FINDINGS OF FACT

1. On January 3, 2002, the Division of Taxation ("Division") sent to petitioner, Oil Plus, Inc., an appointment letter advising it that its New York State tax records for the period

December 1, 1999 through November 30, 2001 had been scheduled for a field audit. The letter requested that all books and records for the period under audit be made available on the appointment date, including financial statements, cash receipts and disbursement journals, general ledgers, sales invoices, purchase invoices, cash register tapes, Federal income tax returns, Quarterly Inventory Report by Retail Service Stations, Form FT-943, daily fuel pump readings, bank statements and cancelled checks. In response, petitioner made available to the auditors gasoline purchase invoices for the period February 16, 2000 through December 24, 2001, gasoline delivery manifests, a proposed schedule of gasoline sales by quarter, daily sales for a six-month period and bank statements.

2. Following a review of the records provided, the auditor determined that there was insufficient source documentation to perform a detailed audit, and decided to employ an indirect audit methodology. The auditor began with a review of the purchase invoices to determine the amount of gasoline purchased during the audit period. The auditor conducted two observations of petitioner's gasoline station and a second related gasoline station to determine the percentage of petitioner's sales from full service and self service pumps, as well as the markups employed by petitioner for each type of sale. The observations determined a 50/50 split between full and self service sales. The markups determined were applied to purchases to arrive at gross sales, the applicable sales tax rate was applied to determine sales tax due, with a credit allowed for prepaid sales tax.

As the convenience store portion of petitioner's business provided no records for audit, the auditor used \$200.00 per day for daily taxable sales based on audit experience. For cigarette sales, the auditor used the amount of prepaid sales tax divided by the per-pack rate to determine the number of cigarette packs sold. Using a sales-price-per-pack estimate of \$4.00, the auditor

arrived at the amount of cigarette sales during the audit period. The auditor did not allow a credit for prepaid sales tax on cigarette purchases as no records were provided that established such payments.

The auditor imposed penalties on the amount of sales tax assessed based on petitioner's failure to maintain adequate books and records, as well as the late payment of sales tax due and the late filing of sales tax returns. Petitioner did not file sales tax returns and pay the tax due in a timely manner for the quarters ended November 30, 2000, February 28, 2001, May 31, 2001, August 31, 2001 and November 30, 2001. These five returns were filed during the course of the audit.

Total additional sales tax due for the audit period was determined to be \$33,505.08, plus penalty and interest.

3. Petitioner filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services ("BCMS") in protest of Notice of Determination L-022521796. The request was received by BCMS on September 16, 2003.

4. Petitioner's request for a conference lists the following as its address:

Oil Plus, Inc.
1635 Hylan Blvd
Staten Island, NY 10305-1912.

5. Petitioner's request for conference also lists the following as its representative's name and address:

Bharat R. Magdalia

110 West 40th Street - Suite # 803
New York, New York 10018.

6. Following the conference, BCMS issued a Conciliation Order to petitioner (CMS No. 198630) dated September 24, 2004, which recomputed the statutory notice by reducing the tax due to \$29,683.15, plus penalty and interest. The reduction was based upon petitioner's

establishing during the course of the BCMS conference that \$3,821.93 had been prepaid on cigarette sales.

7. On June 4, 2005, petitioner filed a petition with the Division of Tax Appeals seeking an administrative hearing.

8. At the hearing, the Division submitted the affidavits of Bruce Peltier and Robert Farrelly, both employees of the Division. The Division also submitted a copy of petitioner's Request for Conciliation Conference, a copy of the certified mail record ("CMR") containing a list of the conciliation orders allegedly issued by the Division on September 24, 2004, and a copy of the subject September 24, 2004 Conciliation Order.

9. The affidavit of Robert Farrelly, Assistant Supervisor of Tax Conferences of BCMS, sets forth the Division's general procedure for preparing and mailing conciliation orders. This procedure culminates in the mailing of the orders by United States Postal Service ("USPS") certified mail and confirmation of the mailing through the receipt by BCMS of a postmarked copy of the CMR.

10. The BCMS Data Management Services Unit prepares and sends the conciliation orders and the accompanying cover letter, predated with the intended date of mailing, to the appropriate conciliation conferee for signature, who in turn, forwards the order and covering letter to a BCMS clerk assigned to process the conciliation orders.

11. The name, mailing address, order date and BCMS number for each conciliation order to be issued are electronically sent to the Division of Taxation's Advanced Function Printing Unit (AFP). For each mailing, the AFP Unit assigns a certified control number and produces a cover sheet that indicates the BCMS return address, date of mailing, taxpayer's name, mailing address, BCMS number, certified control number, and certified control number bar code.

12. The AFP Unit also produces a computer-generated CMR entitled “Assessments Receivable, Certified Record for Presort Mail.” The CMR is a listing of taxpayers and representatives to whom conciliation orders are sent by certified mail on a particular day. The certified control numbers are recorded on the CMR under the heading “Certified No.” The BCMS numbers are recorded on the CMR under the heading “Reference No.” and are preceded by three zeros. The AFP Unit prints the CMR and cover sheets via a printer located in BCMS and these documents are delivered to the BCMS clerk assigned to process conciliation orders.

13. The clerk, as part of her regular duties, associates each cover sheet, conciliation order, and covering letter. The clerk verifies the names and addresses of taxpayers with the information listed on the CMR and on the cover sheet. The clerk then folds and places the cover sheet, covering letter, and conciliation order into a three-windowed envelope where the BCMS return address, certified control number, bar code, and name and address of the taxpayer appear.

14. On the last page of the CMR the BCMS clerk stamps “Post Office Hand write total # of pieces and initial. Do Not stamp over written areas” and also stamps “Mailroom: Return Listing To: BCMS Bldg 9 Rm 180 Att: Conference Unit.”

15. The BCMS clerk also writes the date of mailing of the conciliation orders listed on the CMR at the top of each page of the CMR. In this case “9/24/04” is written in the upper right corner of each page of the CMR.

16. The CMR, along with the cover sheets, covering letters, and conciliation orders are picked up, in BCMS, by an employee of the Division’s Mail Processing Center.

17. This CMR lists 38 certified control numbers and there are no deletions from the list. Each such certified control number is assigned to an item of mail listed on the four pages of the CMR. Specifically, corresponding to each listed certified control number is a notice number, the name and address of the addressee, and postage and fee amounts.

18. Information regarding the conciliation order issued to petitioner is contained on page two of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 0289 6645 is reference/CMS number 000198630, along with the following address:

Oil Plus, Inc.
1635 Hylan Blvd
Staten Island, NY 10305-1912.

19. Page one of the CMR also contains information regarding a conciliation order issued to petitioner's representative. Specifically, corresponding to certified control number 7104 1002 9730 0289 6553 is reference/CMS number 000198630 along with the name and address of petitioner's representative as follows:

Bharat R. Magdalia
110 West 40th Street - Suite 8
New York, New York 10018.

20. The affidavit of Bruce Peltier, Mail and Supply Supervisor in the Registry Unit of the Division's Mail Processing Center, attests to the regular procedures followed by his staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. More specifically, after a conciliation order is placed in the "Outgoing Certified Mail" basket in the Mail Processing Center, a member of the staff weighs and seals each envelope and places postage and fee amounts on the letters. A clerk then counts the envelopes and verifies the names and certified mail numbers against the information contained on the CMR. Thereafter, a member of the staff delivers the stamped envelopes to a branch of the USPS in Albany, New York. A postal employee affixes a postmark and/or his or her initials or signature to the CMR indicating receipt by the post office.

21. In this particular instance, the postal employee affixed a postmark dated September 24, 2004 to each page of the four-page CMR. The postal employee also wrote his or her initials

on page 4 of the CMR and circled the number “38” contained on page 4 of the CMR where it states “total pieces received at post office.”

22. The CMR is the Division’s record of receipt, by the USPS, for pieces of certified mail. In the ordinary course of business and pursuant to the practices and procedures of the Division’s Mail Processing Center, the CMR is picked up at the post office by a member of Mr. Peltier’s staff on the following day after its initial delivery and is then delivered to the originating office, in this case BCMS. The CMR is maintained by BCMS in the regular course of business.

23. Based upon his review of the affidavit of Robert Farrelly, the exhibits attached thereto and the CMR, Mr. Peltier states that on September 24, 2004, an employee of the Mail Processing Center delivered a piece of certified mail addressed to Oil Plus, Inc., 1635 Hylan Boulevard, Staten Island, NY 10305-1912 and a piece of certified mail addressed to Bharat R. Magdalia, 110 West 40th Street - Suite 8, New York NY 10018, to a branch of the USPS in Albany, New York in sealed envelopes for delivery by certified mail. He states that he can also determine that a member of his staff obtained a copy of the CMR delivered to and accepted by the post office on September 24, 2004 for the records of BCMS. Mr. Peltier asserts that the procedures described in his affidavit are the regular procedures followed by the Mail Processing Center in the ordinary course of business when handling items to be sent by certified mail and that these procedures were followed in mailing the pieces of certified mail to petitioner and its representative.

CONCLUSIONS OF LAW

A. There is a 90-day statutory time limit for filing a petition following the issuance of a conciliation order (Tax Law § 170[3-a][e]; 20 NYCRR 4000.5[c][4]). Pursuant to Tax Law

§ 170(3-a)(e) and Tax Law § 1138(a)(1)(b) the conciliation order in this case and the underlying Notice of Determination would be binding upon petitioner unless it filed a timely petition with the Division of Tax Appeals. A conciliation order is “issued” within the meaning of Tax Law § 170(3-a)(e) at the time of its mailing to the taxpayer (*Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). The Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed beyond the 90-day time limit (*see, Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

B. Where the taxpayer files a petition, but the timeliness of the petition is at issue, the Division has the burden of proving proper mailing of the conciliation order (*see, Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). The mailing evidence required of the Division is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of orders by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in the particular instance in question (*see, Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra*). A properly mailed notice or conciliation order creates a presumption that such document was delivered in the normal course of the mail (*see, Matter of Katz, supra*). However, the “presumption of delivery” does not arise unless or until sufficient evidence of mailing has been produced and the burden of demonstrating proper mailing rests with the Division (*id.*).

C. The affidavits of two Division employees, Robert Farrelly and Bruce Peltier, provide adequate proof of the Division’s standard mailing procedure for the mailing of conciliation orders by certified mail. The affidavits generally describe the various stages of producing and mailing conciliation orders and, in addition, attest to the authenticity and accuracy of the copies

of the conciliation order and the certified mail record submitted as evidence of actual mailing. These documents establish that the general mailing procedures described in the Farrelly and Peltier affidavits were followed with respect to the Conciliation Order issued to petitioner and its representative. Petitioner's and its representative's names, addresses and the CMS No. appear on pages two and one, respectively, of the certified mail record which bears a USPS date stamp of September 24, 2004 along with the initials of a Postal Service employee. There are 38 certified control numbers listed on the CMR, and the USPS employee indicated that he received 38 items for mailing. The Division has, therefore, established that it mailed the Conciliation Order to petitioner and its representative by certified mail on September 24, 2004 (*Matter of DeWeese, supra*).

D. The petition was filed on June 4, 2005. Accordingly, it is found that the petition was filed more than 90 days after the mailing of the Conciliation Order. Since the petition was not mailed to the Division of Tax Appeals within the statutory 90-day period, the Division of Tax Appeals has no authority to hear petitioner's challenge to the Conciliation Order.

E. Although the Tax Law does not specifically provide for the service of a statutory notice on a taxpayer's representative, the Tax Appeals Tribunal has consistently held that the 90-day period for filing a petition or request for a conciliation conference is tolled if the taxpayer's representative is not served with the statutory notice (*see, Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000; *Matter of Multi Trucking*, Tax Appeals Tribunal, October 6, 1988, *citing Matter of Bianca v. Frank*, 43 NY2d 168, 401 NYS2d 29).

Here, it is noted that there is a small discrepancy between the taxpayer's representative's address as indicated on the Request for Conciliation Conference and the address on the subject

Conciliation Order.¹ Given the absence of any evidence to show that petitioner's representative at the time the conciliation order was mailed did not actually receive the subject order it is concluded that such difference is inconsequential (*see, Matter of Combemale*, Tax Appeals Tribunal, March 31, 1994).

F. Inasmuch as the petition was filed late, the other issues raised by petitioner will not be discussed.

G. The petition of Oil Plus, Inc. is dismissed with prejudice².

DATED: Troy, New York
June 1, 2006

/s/ Thomas C. Sacca
PRESIDING OFFICER

¹ Specifically, the record reveals that petitioner's representative's address was 110 West 40th Street - Suite 803, New York, New York, while the Conciliation Order was addressed to petitioner's representative at 110 West 40th Street - Suite 8, New York, New York.

² It should be noted that petitioner is not entirely without a remedy in this matter. Petitioner may pay the tax due and then file a claim for refund of the amount paid with the Division of Taxation. If petitioner's claim for refund is denied, petitioner may then file a petition with the Division of Tax Appeals challenging the denial of its refund claim.